

LAW OFFICES
HALEY, BADER & POTTS

4350 NORTH FAIRFAX DR., SUITE 900

ARLINGTON, VIRGINIA 22203-1633

TELEPHONE (703) 841-0606

FAX (703) 841-2345

POST OFFICE BOX 19006

WASHINGTON, D.C. 20036-9006

TELEPHONE

(202) 331-0606

SUSAN H. ROSENAU

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 16, 1994

By Hand Delivery

Mr. William F. Caton

Acting Secretary

Federal Communications Commission

Washington, D.C. 20554

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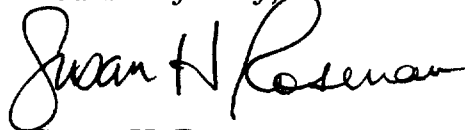
RE: MM Docket No. 93-42, Calistoga, California

Dear Mr. Caton:

On behalf of Moonbeam, Inc., an applicant (File No. BPH-911115MG) for a New FM Station on Channel 265A in Calistoga, California, please find the original and six copies of its Opposition to Petition to Reopen the Record of Gary E. Willson in the above-referenced proceeding.

Kindly communicate any questions directly to this office.

Yours very truly,



Susan H. Rosenau

Enclosures (6)

cc: Moonbeam, Inc.
Robert Zauner, Esquire
A. Wray Fitch, Esquire
Administrative Law Judge Edward Luton

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Before The
Federal Communications Commission
Washington, D.C. 20554

FEB 16 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications Of

MOONBEAM, INC.

GARY E. WILLSON

For a Construction Permit for a
New FM Station on Channel
265A in Calistoga, California

) **Docket No. MM 93-42**

) File No. BPH-911115MG

) File No. BPH-911115MO

To: The Honorable Edward Luton
Administrative Law Judge

**Opposition to Petition to Reopen
the Record**

Lee W. Shubert
Susan H. Rosenau
HALEY, BADER & POTTS
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
703/841-0606

February 16, 1994

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Before The
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In re Applications Of)	Docket No. MM 93-42
)	
MOONBEAM, INC.)	File No. BPH-911115MG
)	
GARY E. WILLSON)	File No. BPH-911115MO
)	
For a Construction Permit for a)	
New FM Station on Channel)	
265A in Calistoga, California)	

To: The Honorable Edward Luton
 Administrative Law Judge

Opposition to Petition to Reopen the Record

Pursuant to Sections 1.229 of the Commission's Rules,
 Moonbeam, Inc. ("Moonbeam"), by its attorneys, respectfully submits its
 Opposition to the Petition to Reopen the Record and Enlarge Issues
 Against Moonbeam, Inc. filed by Gary E. Willson on January 11, 1994
 ("Petition").

Summary

1. In his Petition, Willson contends that the Presiding Officer should reopen the record and add misrepresentation, 1.65 reporting, and ineptness issues against Moonbeam because Moonbeam failed to amend its application to reflect that Frederic W. Constant, husband of Moonbeam's principal Mary F. Constant, is employed as General Manager of KRSN(FM), Middletown, California. Willson also attempts -- unsupported by any credible evidence -- to establish that Mr. Constant has an ownership interest in KRSN. Finally, Willson attempts to resurrect his previously-denied request for a 1.65 issue with respect to

Mr. Constant's station in Ketchum, Idaho¹, which was fully dealt with in the context of Willson's Third Petition to Enlarge Issues Against Moonbeam, Inc.²

2. As explained below, Willson has presented no cognizable evidence that Moonbeam intended to conceal or misrepresent Mr. Constant's employment, that the delay in reporting is decisionally significant let alone likely to disqualify Moonbeam, or that Moonbeam has been inept or careless in the prosecution of its application. Further, the Petition is untimely. Accordingly, the Petition must be denied.

3. Finally, the petition should be denied because the matter of Mr. Constant's employment is of no decisional significance. Using the reasoning employed by the United States Court of Appeals for the District of Columbia Circuit in *Bechtel v. FCC*, 1993 WL 521071 (D.C. Cir., December 17, 1993), the FCC's diversification criteria in comparative broadcast proceedings is discredited.

ARGUMENT

4. As shown below, Willson plainly fails to meet the elevated standard for reopening of the record and enlargement of issues. To add issues after the closing of the record in a comparative case, the petitioner must establish not only that a substantial and material issue of fact exists, but also that the issue is likely to be "decisionally significant" and that the petitioner is likely to prove facts requiring a decision in his favor. *See, e.g., Thomas W. Lawhorne*, 7 FCC Rcd 4341 (1992). Willson has

¹The Petition *twice* erroneously identifies the station as being licensed to Eagle, Idaho. Applying the standard by which Willson has judged Moonbeam throughout this case, this inconsistency would *compel* Moonbeam to seek an ineptness issue against Willson on the basis of his demonstrated indifference to the accuracy of his representations before the Commission.

²It was Moonbeam's position then, as it is now, that the Ketchum station did not have to be reported. FCC Form 301, question 12(b), requires the applicant to identify family interests in stations *in the same area* as the proposed station.

failed to even establish that Ms. Constant should have known to report her husband's employment. The slender evidence presented here certainly does not meet the rigorous requirements for post-hearing designation of issues.

I. CONCEALMENT/MISREPRESENTATION

5. Willson's only "evidence" that Moonbeam intended to conceal Mr. Constant's employment from the Commission is his unsupported assertion that the employment may have some negative effect on Moonbeam's comparative position in this proceeding. At this stage in these proceedings, the burden rests squarely on Willson to establish that he is "likely" to prove intentional misrepresentation by Moonbeam. It is settled law that Willson's showing of "implied intent" is insufficient to establish a *prima facie* case of intent to deceive. *See, e.g., Pinelands, Inc.*, 7 FCC Rcd 6058, 6066 (1992) (failure to report media interests of investor in excess of FCC limitations); *Naguabo Broadcasting Company*, 7 FCC Rcd 1696 (1992)(misrepresentation issue refused because no evidence of misrepresentation in failure to report acquisition of station by applicant's father); *Valley Broadcasting Company (KVBC(TV))*, 4 FCC Rcd 2611, 2612, 2615 (Rev. Bd. 1989)(reporting violation issues will not be designated unless there is *evidence* of intent to conceal); *In re Stephen P. Bellinger*, 49 FCC 2d 1377 (Rev. Bd. 1974)(no misrepresentation issue added for failure to report possible cross-interest, where no evidence of intent to conceal). Willson's showing is even more deficient in light of the advanced stage of this proceeding.

6. Moonbeam does not dispute the fact that Mr. Constant is employed as General Manager of KRSH(FM). However, in the Declaration submitted herewith, Ms. Constant states under penalty of perjury that:

(1) she did not intend to conceal her husband's employment as General Manager of KRSH(FM);

(2) she was in fact unaware of any negative impact his employment might have on Moonbeam's application, and

(3) she did not realize management positions required reporting. *See generally*, Declaration of Mary F. Constant, submitted herewith as Exhibit A. Mr. Constant's employment has been open and notorious throughout the local community, and further, Mr. Constant has agreed to give up his employment if it will result in a diversification demerit against Moonbeam. *Id.* Finally, Moonbeam has recently filed a Petition to Amend its application to reflect Mr. Constant's current employment, and his divestment commitment.

7. Willson tries to establish intent by arguing that Mary Constant had motive to conceal because Fred Constant's employment would result in a demerit against Moonbeam. A critical link is missing from Willson's argument, *i.e.*, Willson has not established that Fred Constant's employment will be attributed to Mary Constant at all. Not a single case cited by Willson attributes *managerial employment* between spouses. Willson's attempt to simultaneously extend Commission law on spousal attribution and use the extension as "bootstrap" evidence of implied or constructive motive to conceal must be rejected. The thread of Willson's logic here is tenuous, indeed.³

³ Willson's allegation that Mr. Constant has an undisclosed ownership interest in KRSH is even more tenuous; in fact, the allegation is totally unsupported by cognizable evidence. Section 1.229 requires that a petition to enlarge be supported by the affidavits of persons having personal knowledge. Willson's "support" for his accusation consists wholly of innuendo and nothing more. Mr. Constant's past employment of KRSH's owner and his initial offer to finance the KRSH application prove nothing other than, perhaps, that Mr. Constant served as a mentor to Robert Cross in the broadcast field, and as such was willing, at some point, to help his former employee go into business for himself. *See Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1172 (Rev. Bd. 1981)("Speculation and innuendo" insufficient to support enlargement).

8. Accordingly, Willson has miserably failed to meet the standard of proof for addition of a concealment/misrepresentation issue against Moonbeam, and his request should be denied.

II. 1.65 REPORTING ISSUE/ INEPTNESS

9. As stated in *Valley Broadcasting, supra*:

It is well-settled that reporting failures will not warrant disqualification, absent suitable evidence of an intent to conceal pertinent information from the Commission, or other evidence reflecting violations so numerous and serious as to undermine the applicant's responsibility to be a licensee.

4 FCC Rcd at 2618; *see also Pinelands, supra*, at 6066.

10. As noted above, Willson has presented no evidence of intent to conceal. Willson has not even established *prima facie* that Mr. Constant's position is legally attributable to Moonbeam. Neither has Willson presented a *prima facie* showing of "violations so numerous and serious" as to disqualify Moonbeam as a licensee. *Id.* As a result, Willson's petition must be denied.

11. As explained above, Willson has offered no direct authority for the proposition that spousal employment is attributable to a broadcast applicant, or, for that matter, that spousal employment implicates the Commission's diversification concerns and would thus count as a demerit. Further, *Richard P. Bott* states that spousal attribution, *where applicable*, can be rebutted, a fact which Willson dismisses without serious discussion. *Richard P. Bott*, 4 FCC Rcd 4924 (Rev. Bd. 1989). This falls far short of the mark to establish that the record herein should be reopened because Willson is likely to prevail. Indeed, without establishing that spousal employment is attributable and results in a comparative diversification demerit, Willson cannot fairly

claim the information was "material" under Section 1.65 of the Rules, and therefore reportable.

12. Willson's attempt to cast this situation as Moonbeam's *second* failure to report Mr. Constant's media interests must also be rejected. Any issues raised by Mr. Constant's interest in a Ketchum, Idaho FM station -- including ineptness -- were already adjudicated in Moonbeam's favor by the Presiding Officer, when Willson's third enlargement petition was denied in all respects. *See Memorandum Opinion and Order*, FCC 93M-594 (released September 14, 1993). Moonbeam's position was then, as now, that Moonbeam never had an obligation to report the Ketchum, Idaho acquisition, because FCC Form 301 only requires the reporting of family broadcast interests *in the same area* as the proposed station. *See* FCC Form 301, question 12(b).⁴ Willson wants another bite at the apple, which should be firmly denied.⁵ In summary, Willson has failed to demonstrate a material violation of 1.65, and therefore no added issue is justified.

III. THE STANDARD FOR REOPENING THE RECORD HAS NOT BEEN MET

13. The record in this proceeding was closed on November 15, 1993. As Willson concedes, before the record in this proceeding may be reopened, he must demonstrate that he is likely to prove his allegations,

⁴ Although Willson may argue that applicants are not permitted to rely on the actual wording of the questions set out on Form 301 as sufficiently describing the information to be disclosed, such a position would raise serious due process concerns, particularly if used as the basis of misrepresentation or ineptness issues. There can be no question that the FCC's forms are organized, presented and written in a manner which implies that they are self-explanatory, except where specific cross-references are set forth therein. Question 12(b) of FCC Form 301 contains a cross-reference to Section 73.3555 -- which says nothing about reporting interests outside the area of the proposed station.

⁵ Willson also wants to keep Moonbeam's legal costs up, *see* Reply to Findings and Conclusions of Gary E. Willson, filed February 16, 1994.

and that the allegations are likely to be of decisional significance. Petition at 8; *see also Thomas W. Lawhorne, supra*.

14. As explained at length above, Willson has not even met the basic standard of proof for enlargement of issues. To contend that he is likely to prevail at a hearing on such issues is pure fantasy.

15. In addition, even if Willson could establish that Mr. Constant's management position at KRSH(FM) is attributable to Moonbeam for diversification purposes, the D.C. Circuit's decision in *Bechtel, supra*, raises serious questions whether the FCC's diversification criterion in comparative broadcast proceedings should be given further application, insofar as the diversification policy suffers from much the same infirmity as the integration policy.

16. The FCC's diversification policy is in large part duplicative of the FCC's multiple ownership rules. The diversification policy and the multiple ownership rule serve the same avowed purpose: to provide for "maximum diffusion of control of the media of mass communications," which is itself deemed to be "a public good." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394-395 (1965). The diversification policy is, however, more extensive and more strict. The spousal attribution policy is an apt example. The Commission has ruled that, for the purpose of the multiple ownership rules, spousal attribution is not presumed or conclusive. Instead, the issue is evaluated on a case-by-case basis, by evaluating of a number of factors. *Clarification of Commission Policies on Spousal Attribution*, 7 FCC Rcd 1920 (1992). These factors are focused on the actual relationship between the spouses and their respective broadcast interests. *Id.* In the diversification context, in contrast, spousal attribution is presumed, and the applicant

bears the burden of rebutting the presumption, a difficult task. *Richard P. Bott*, 4 FCC Rcd 4924, 4926 (Rev. Bd. 1989).

17. Multiple ownership, however, is permitted within the limits of the rule, and in cases where the public interest is served, applicants may seek a waiver of the multiple ownership rule. On the other hand, even a slight diversification demerit may spell defeat for an otherwise highly qualified applicant for a new station.

18. As in the integration policy rejected by the Court in *Bechtel*, no apparent rationale justifies applying a different standard to new stations than existing ones. *See generally, Bechtel*. Also as in *Bechtel*, the diversification policy assures no permanence of any benefits over and above those already conferred by the multiple ownership rules. An applicant may have no attributable interests from the date of filing his application for a new station through the date the coveted construction permit is awarded, but he may the very next day apply for consent to acquire interests to the full extent of the multiple ownership rules, or may in a short period seek consent to transfer the permit or license to a qualified party with other media interests. *In short, the diversification policy accomplishes nothing*. Accordingly, the policy is arbitrary and capricious and, like the integration policy, should be abandoned. *See generally, Bechtel*.

IV. WILLSON'S PETITION IS UNTIMELY

19. Where, as here, the record has been closed, competing applicants must strictly adhere to the time limitations set forth in Section 1.229 of the Commission's Rules. 47 C.F.R. 1.229(c). Untimely petitions must be denied unless the petitioner demonstrates decisional significance, public interest importance, *and* likelihood of success in proving the matters alleged. *Id.*; *Great Lakes Broadcasting, Inc.*, 6 FCC

Rcd 4331, 4332 (1991). As explained at length above, these are standards Willson has plainly failed to meet.

20. Willson's own "evidence" proves him untimely. Exhibit 1 to the Petition contains a newspaper article dated November 21, 1993 identifying Mr. Constant as KRSH(FM) General Manager. Accepting Willson's argument that he was entitled to wait thirty days (allowing Moonbeam 30 days to amend per 1.65) plus 15 days, before filing his petition, he exceeded the filing period by *at least* five days. Accordingly, Willson's petition should be dismissed as untimely.

V. WILLSON'S DISCOVERY REQUEST IS EXCESSIVELY BROAD

21. Willson improperly entangles his questions regarding Mr. Constant's employment as KRSH(FM) General Manager and his rank speculation regarding the ownership of KRSH(FM). If issues are in fact added in this proceeding, both the issues and discovery must be limited to those matters, *if any*, for which Willson has met the standard for enlargement after closing of the record.

22. Further, Mr. Constant's duties, position and obligations at KRSH(FM) are irrelevant to the question of whether his position is attributable to Mary Constant, or whether Mary Constant intentionally concealed his position. Moonbeam does not dispute that Mr. Constant is a managerial employee of KRSH(FM). No disputed or relevant question before the Presiding Officer turns on Mr. Constant's duties or obligations, and his position is a matter of record. Accordingly, Willson's discovery request should be denied.

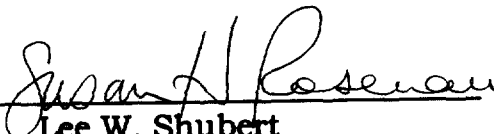
CONCLUSION

Willson has failed to establish grounds for the designation of any issue against Moonbeam. His only evidence is the bare fact that, as

of the date of his petition, Moonbeam had not petitioned to amend her application to reflect Fred Constant's position as General Manager of KRSH(FM). He has presented no evidence of intentional concealment or misrepresentation and no evidence of a pattern of carelessness. Further, as a matter of law, Mr. Constant's employment should not be considered decisionally significant, and therefore does not justify reopening the record and addition of issues. As a result, the Petition should be denied.

Respectfully submitted,

MOONBEAM, INC.

By 
Lee W. Shubert
Susan H. Rosenau

Its Attorneys

HALEY, BADER & POTTS
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
703/841-0606

February 16, 1994

EXHIBIT 1


DECLARATION OF MARY F.CONSTANT

Mary F. Constant, under penalty of perjury, declares as follows:

1. I make this declaration on the basis of personal knowledge.
2. I am the President, Treasurer, Director and sole shareholder of Moonbeam, Inc. ("Moonbeam"), the applicant in this proceeding.
3. My husband, Frederic W. Constant, is presently employed as the General Manager of KRSH(FM), Middletown, California.
4. My husband's position as KRSH(FM) General Manager is well-known to the public. The KRSH(FM) main studio is located at our vineyard. He has been quoted in the local papers and spends much of his time conducting business on behalf of KRSH(FM).
5. I have never tried or intended to conceal my husband's employment from the FCC or anyone else. Prior to the filing of Gary Willson's Petition, I believed Moonbeam was not required to report this employment to the FCC. In fact, it was my belief that Moonbeam was only required to report *ownership* interests in stations in the same area as Moonbeam's proposed station.

6. I have never heard of any FCC policy which would penalize Moonbeam in the application process based on my husband's employment at a broadcast station. My husband has agreed that if any broadcast employment, application or ownership interest of his will be counted against Moonbeam in this proceeding, he will divest himself of that employment or interest.

Executed under penalty of perjury this 14 day of February, 1994.


Mary F. Constant

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing Proposed Findings of Fact and Conclusions of Law was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

A. Wray Fitch, III, Esquire
Gammon & Grange
8280 Greensboro Drive
7th Floor
McLean, VA 22102-3807

Administrative Law Judge Edward Luton*
Federal Communications Commission
2000 L Street N.W.
Room 225
Washington, D.C. 20554

Robert Zauner, Esquire*
Federal Communications Commission
Mass Media Bureau, Hearing Branch
Suite 7212
2025 M Street N.W.
Washington, D.C. 20554

Nancy E. Daves

February 16, 1994